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No. 516

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

RKO TELERADIO PICTURES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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MAY IT PLEASE THE COURT:

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment entered in this cause on the 11th day of June, 1963, and an order overruling petition to rehear entered on the 16th day of July, 1963.

OPINIONS BELOW

The opinion of the District Court is reported at 201 F. Supp. 574, et seq. The opinion of the Court of Appeals dated June 11, 1963, is reported at 318 F. 2d 73, et seq. The opinion of the Court of Appeals dated July 16, 1963, is not reported.

Both of the opinions of the Court of Appeals are appended together with the opinion of the District Judge, Bailey Brown, which was rendered when respondent's motion for judgment notwithstanding verdict or for order granting new trial was overruled in all respects.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

QUESTIONS PRESENTED.

1. In view of the prohibition of the Seventh Amendment to the United States Constitution and the applicable decisions of this Court, does a Federal Appellate Court, in reviewing a jury verdict for breach of contract, founded on substantial evidence, have the authority to substitute its finding of fact for that of the jury on the issue of what damages may be said to have been within the contemplation of the parties, and thereupon reduce the award of compensatory damages by 90%?

2. May a Federal Appellate Court, in reviewing a jury verdict for compensatory damages for breach of contract to deliver television advertising time, hold that the market value of such television time is not admissible when all applicable authority is to the contrary?

3. May a Federal Appellate Court, in reviewing a jury verdict for breach of contract, in effect, rewrite the contract itself so as to provide therein an option on the part of the party in breach whereby such wrongdoing party is relieved from its obligation to deliver the very thing called for by the contract?

CONSTITUTIONAL PROVISION INVOLVED.

This case involves a violation of the Seventh Amendment to the Constitution of the United States which is as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty ($20.00) Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, brought a common law action for breach of contract against the respondent, the defendant below, which arose under Tennessee law, damages being sought for failure to deliver approximately one-third of the number of television spot announcements which respondent had agreed to deliver over its television station in Memphis, Tennessee, in exchange for petitioner's fully performed obligation to acquire land and build broadcasting facilities thereon for use by respondent for a period of ten years.

Jurisdiction was based on diversity of citizenship and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

Petitioner is a life insurance company organized under the laws of the State of Tennessee with its principal office and place of business in Chattanooga, Tennessee, and has for many years maintained sales offices in the City of Memphis and does business, among other states, in the states of Tennessee, Arkansas and Mississippi.

The repondent is a subsidiary of General Tire and Rubber Company and owns and operates a chain of radio and television stations in various parts of the United States, including Television Station WHBQ in Memphis, Tennessee.

For a number of years prior to the year 1953, Harding College of Searcy, Arkansas, owned and operated a radio station located in the Chisca Hotel, Memphis, Tennessee, and in the year 1953, it obtained from the Federal Communications Commission a license or permit to operate a television station, WHBQ T. V. upon Channel 13, in Memphis, Tennessee (282a., 283a).*

* This reference and all other references containing "a" are references to pages in respondent's appendix filed in the Court of Appeal.

Harding College, desiring to obtain suitable broadcasting facilities for the operation of its said proposed television station, approached petitioner for the purpose of interesting petitioner in acquiring a certain tract of land in Memphis, Tennessee and building thereon broadcasting facilities suitable for use and occupancy by said proposed television station for ten years, in exchange for advertising time to be delivered over said television station in petitioner's behalf (35a.) during said period.

As a result petitioner and Harding College entered into such a contract in August, 1953, whereby petitioner agreed to acquire the specified tract of land and construct thereon specified broadcasting facilities and whereby the television station was to occupy this land and building when completed for ten years in exchange for certain television advertising to be delivered over said television station on petitioner's behalf. This contract appears as Exhibit 1 (428a.), and was executed prior to any actual operation of the station (282a., 283a.).

Petitioner had never before built a building for occupancy by others (4b., 5b.)* and its only purpose in doing so on this occasion was its desire to receive television advertising in the rapidly growing and expanding Memphis trade area (35a., 36a.). In fact, petitioner would not have acquired this land and built the building except for this reason (36a.).

In late June, 1954, construction of the building in question was completed and the premises were turned over to Harding College in July, 1954 for occupancy by the television station for a period of ten years (284a.).

Respondent, some months prior to completion of the building itself and, of course, before occupancy, had pur-

* This reference and all other references containing "b" are references to pages in petitioner's appendix filed in the Court of Appeals.

chased the television station from Harding College contingent only upon obtaining approval of the sale by the Federal Communications Commission. Such approval was obtained in early July, 1954 and respondent assumed all the obligations of Harding College under the contract, a few days after the initial occupancy of the building by Harding College (38a.).

It is admitted by respondent that there was nothing in the obligation to deliver on petitioner's behalf the called for television advertising time which was objectionable to respondent and it is likewise admitted that respondent could have, in fact, delivered same fully, had it seen fit to do so (68b.).

Paragraphs 7 and 8 of the contract (430a., 431a., 432a.) are the pertinent provisions of the contract. Inasmuch as these provisions are set forth verbatim on footnote 1 to both the reported and the appended opinion of the United States Court of Appeals for the Sixth Circuit filed June 11, 1963, same are not set forth verbatim herein.

However, paragraph 7 in effect requires respondent to deliver in petitioner's behalf a minimum of twenty advertising spot announcements over its television station daily during the term of the contract.

Paragraph 8 provides in essence that if petitioner ever desired to discontinue its television advertising program, then, in such event, petitioner, and at respondent's election, could either (a) sell its allotted advertising time for cash to others, or (b) receive a cash rental from respondent in accordance with the formula therein set forth, which would amount to a cash rental of $9,600.00 annually. Petitioner, however, never elected to discontinue its television advertising program and, consequently, these alternative provisions never became effective.

The record discloses that in May of 1959 it was brought to petitioner's attention that it was not receiving all of

the announcements to which it was entitled under its contract, and as a result of an inquiry made at that time, petitioner discovered that it had received only two-thirds of the minimum number of television announcements called for by the contract (9b.).

Upon discovery that petitioner had in fact received only two-thirds of the required number of announcements during the period from July, 1954, to May, 1959, petitioner thereupon filed the instant suit against respondent seeking damages for breach of the contract.

The breach of the contract was admitted, and there was no real dispute as to the number of announcements not given in breach thereof. Further, it is undisputed that the time owed petitioner and not given, was used by respondent. Consequently, the only real issue presented in the trial was that of damages for breach, together with attorneys' fees and expenses incurred by petitioner in connection with the suit.

It was and is petitioner's theory that in assessing damages for breach of contract to deliver a valuable commodity, to-wit, television advertising time, the jury could consider, among other factors, the market value of the commodity not delivered.

The following proof on the issue of damages is in this record:

(1) That petitioner's sole purpose in acquiring the land and erecting the special-purpose building thereon, to respondent's specifications, was to obtain television advertising time in its behalf (35a., 36a.). Otherwise, it would not have been interested in acquiring the land and building the special-purpose facilities in question (36a.).

(2) That during the period in controversy respondent at all times published rate cards showing the prices at

which it was willing to sell such advertising time to advertisers at large (30b., 31b.).

(3) That the number of omitted announcements as shown by respondent's own records amounted to 12,208 announcements (84b.).

(4) That the price petitioner would have to pay to purchase said omitted announcements for cash from respondent was established by respondent's published rate cards and conversely the value which the respondent itself placed upon these omitted announcements was shown by its published rate cards (63b., 64b., 65b.).

(5) That respondent offered such announcements for sale to the public, on its published rate cards (Ex. 22, 449a.) and, in fact, sold identical announcements to others during the period in question (69b., 70b.) (Ex. 48, 459a).

(6) That in the last ten to twelve years television advertising has become the most powerful, effective and important type of advertising media (21b.) and that petitioner's contract for twenty advertising announcements daily for ten years was a tremendously valuable advertising contract (51b.).

(7) That the published rate cards of a television station are the best yardstick for valuing television time (55b.), that as a matter of practice in the industry discounts were not given for frequency in excess of those shown on the rate cards (31b., 32b., 33b.) and that petitioner's contract would not be discounted beyond discounts shown on the rate cards (65a., 66a.).

(8) That Harding College owned and operated a radio station prior to obtaining a license or permit to operate the television station WHBQ T.V. (282a., 283a.), and that respondent owns and operates a chain of radio and television stations, establishing experience on the part of both in the advertising world.

(9) That respondent wrote petitioner a letter in December of 1959 (Ex. 2, 309a., 310a.), in which respondent itself measured the value of plaintiff's television spot announcements in terms of cash in accordance with its published rate cards.

(10) That the value of the omitted announcements, computed in accordance with respondent's own published rate cards, and after giving effect to all applicable frequency discounts as shown thereon (ranging from not less than 25% to as much as 60%) amounted to $323,243.07 (85b.); or an average value per announcement of $26.48 (87b.).

The foregoing proof clearly established a fact issue as to what damages may reasonably be said to have been within the contemplation of the parties as a probable result of the breach of the contract.

In submitting the case to the jury the trial court properly charged the jury (the entire charge appears at pages 405a.-415a. and the pertinent portion thereof appears as footnote 2 to both the reported and the appended opinion of the Court of Appeals, filed June 11, 1963) in part as follows:

> "'Now, members of the jury, in arriving at the amount of damages, if any, plaintiff is entitled to recover, there is another principle of law of damages as to which the Court will charge you. This principle is that a party which has suffered a breach of contract may recover, for such breach, damages and only such damages as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. In determining what damages can reasonably be said to have been in the contemplation of both parties, at the time they made the contract, as a

probable result of the breach of it, you may consider all the facts and circumstances which have been admitted in evidence in this case, including all of the terms of the contract itself.' "

The jury, plainly directed by the charge to determine the fact issue of whether or not the market value of the television advertising time was within the contemplation of the parties as the probable result of a breach of the contract, resolved the issue in favor of petitioner by returning a verdict for petitioner in the total amount of $165,900.00, of which $150,000.00 was assessed as damages for breach of the contract and $15,900.00 was awarded as attorneys' fees and expenses (15a.) and judgment thereon was entered (16a.).

The award of compensatory damages in the amount of $150,000.00 was less than half the value of the omitted announcements computed in accordance with respondent's own published rate cards, to-wit $323,243.67.

Respondent moved for judgment notwithstanding a verdict or for order granting new trial (17a; 24a.).

The trial court approved the jury verdict and overruled respondent's said motion (31a., 32a.).

Respondent appealed.

OPINION OF THE COURT OF APPEALS

In the face of this proof the Court of Appeals has held that there is no proof in the record warranting the submission to the jury of the issue as to whether or not the market value of television advertising time could be said to have been within the contemplation of the parties as a probable result of breach of the contract. It necessarily follows that in arriving at this result the Court of Appeals has retried this issue, one plainly for the jury in the light

of the foregoing proof and has substituted its finding of fact for that of the jury.

The Court of Appeals further found in reviewing the proof that in its opinion the sole and only measure of damages to be applied in this case is the alternative cash formula appearing in paragraph 7 of the contract, which the Court said would amount to an annual figure of $9,600.00, completely ignoring the immediately preceding clause of the contract which contemplated that petitioner be entitled to sell its allotted television time for cash for its own account if it ever elected to discontinue its advertising program.

The Court of Appeals then concluded that since petitioner, over a period of five years, had not received one-third of the announcements to which it was entitled, it could, therefore, recover only one-third of the $9,600.00 figure annually over the five year period, or $16,000.00.

The Court of Appeals then held that the $150,000.00 jury award for compensatory damages was excessive to the extent that it exceeded $16,000.00 and ordered that the jury verdict in favor of the petitioner herein would be reversed and the case remanded for a new trial unless petitioner files herein a remittitur of $134,000.00, approximately 90% of the jury award of $150,000.00.

A petition to rehear was filed and denied.

ARGUMENT.

I.

The Court of Appeals, in Reviewing a Jury Verdict for Breach of Contract for Failure to Deliver a Commodity, Has Reduced the Jury Verdict and Judgment in Violation of the Seventh Amendment and Applicable Decisions of This Court by Substituting Its Findings of Fact for That of the Jury Under Conflicting Proof as to What Damages May Be Said to Have Been Within the Contemplation of the Parties.

This was a common law action for breach of contract. And the recognized conflicts in the evidence gave the jury the right to determine from the facts presented the question as to what damages may reasonably be supposed to have been within the contemplation of the parties, when the contract was made, as a probable result of the breach of it.

The jury, under a proper charge, found that the value of the television time was within the contemplation of the parties. However, the Court of Appeals has re-examined the verdict of the jury and the approval of same by the trial Judge and has concluded otherwise, with the result that the jury verdict has been reduced by almost 90%.

In doing so, the Court of Appeals has held as a matter of fact that the market value of this television advertising time could not be said to have been within the contemplation of the parties when the contract was made. The Court of Appeals then found as a matter of fact that one of the two alternative methods of paying rent set forth in Paragraph 8 of the contract, these alternatives never having become effective, established the only and sole measure of damages applicable to the facts of this

case, completely ignoring the other of said two alternative methods, which shows on its face that the market value of this television time was equally within the contemplation of the parties.

Therefore, having retried this fact issue and having arbitrarily selected one of these two alternative methods of paying rent as the sole and exclusive measure of damages the Court of Appeals then held that this verdict was excessive by the amount that it exceeded the measure of damages established by the Court of Appeals. If the Court of Appeals is correct, then the following proof in this record must be completely expunged because it conclusively demonstrates that the issue of whether or not the market value of this television advertising time could be said to have been within the contemplation of the parties as a possible result of breach of the contract, was a proper issue for the jury to decide and not one for review by an Appellate Court on appeal:

(1) Respondent and its predecessor were both engaged in the advertising business via the operation of radio and television stations.

(2) The value of the television time was the sole inducement for petitioner to enter into this contract.

(3) Respondent at all times established a valuation of this television time by its own published rate cards which are the best yardstick for valuing television time, the same showing the going rates therefor in the market place, and what businessmen are willing to pay for it.

(4) Respondent's own letter to petitioner placing a monetary value on petitioner's advertising spots in accordance with respondent's published rate cards.

(5) Respondent's own rate cards establishing the market value of identical television advertising spots and offering same for sale.

(6) The first of the two alternative methods of paying rent in paragraph 8 of this contract appearing immediately before the alternative method adopted by the Court of Appeals as the sole measure of damages in this case which expressly provides:

> "The time allotted to the Lessor may be sold by the Lessor to another advertiser or advertisers and the proceeds therefrom be retained by the Lessor."

(7) And, while perhaps not proof as such, the very practical and inescapable conclusion that when two parties contract for delivery of a commodity there is no way in the world for the value of that commodity not to be a matter of consideration and importance to one or both, and within their contemplation.

This action by the Court of Appeals is a plain, clear and obvious violation of the express language of the Seventh Amendment, as it constitutes the re-examination of a question of fact tried before a jury whose verdict thereon has been approved by the trial court.

This Court has repeatedly held that the Courts of Appeal have no right or authority to substitute their facts findings for that of the jury where there is evidence in the record to support the jury verdict and the trial court has approved the verdict.

In **Parsons v. Bedford, Breedlove & Robeson**, 28 U. S. 433, 7 L. Ed. 732, 737, this Court, after quoting the Seventh Amendment, said:

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or

the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (secs. 22, 24) to this court to redress errors of law; and, for such errors to award a new trial, in suits at law which have been tried by a jury."

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. Ed. 439, 443-444, 53 S. Ct. 252, this Court refused to set aside a judgment based upon a jury verdict for $1.00 which was admittedly less than the actual damages of the party. The Court said:

"First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in Sec. 22 that there should be 'no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refus-

ing of a motion for a new trial is a matter within the discretion of the trial court."

In **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 247, 60 S. Ct. 811, 84 L. Ed. 1129, this Court said:

> "Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. Certain exceptions have been noted, such as instances where the trial court has 'erroneously excluded from consideration matters which were appropriate to a decision on the motion.' Fairmount Glass Works v. Cub Fork Coal Co., supra, 287 U. S., page 483, 53 S. Ct., page 255, 77 L. Ed. 439. . . ."

In **United States v. Johnson**, 327 U. S. 106, 112, 90 L. Ed. 562, 66 S. Ct. 464, this Court said with respect to a similar situation:

> "The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact."

In **Neese v. Southern Railway Company**, 350 U. S. 77, 100 L. Ed. 60, 76 S. Ct. 131, this Court in a per curiam decision likewise held in a similar situation:

> "We reverse the judgment of the Court of Appeals, 216 F. 2d 772, without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The astounding result reached by the Court of Appeals in this case likewise is contrary to its own stated position on review of a jury verdict.

In **Still v. Townsend**, 311 F. 2d 23, 25 (6th Cir.), this very Court of Appeals after stating the holding by this Court in **Fairmount Glass Works v. Cub Fork Coal Co.**, supra, stated that it recognized only one exception to the rule of non-reviewability on appeal:

> "But the exception is limited to a situation where the uncontradicted and undisputed facts leave no factual issue for the consideration of the jury and it is clearly shown that the verdict is an abuse of power on the part of the jury."

In the light of the proof in this record by no stretch of the imagination can it be said that "the uncontradicted

and undisputed facts leave no factual issue for the consideration of the jury" with respect to whether or not the value of this television advertising time was within the contemplation of the parties at the time the contract was made, as a probable result of a breach thereof.

If the Courts of Appeal are permitted to reduce jury verdicts, as here, by saying that there is no proof in the record on a fact issue when the record conclusively demonstrates otherwise, then the Seventh Amendment to the United States Constitution and the decisions of this Court are thereby circumvented and the Courts of Appeal are constituted as the "triers of fact" and not the jury.

II.

The Court of Appeals Has Held, Contrary to All Applicable Authority, That the Value of the Advertising Time Involved Herein Cannot Be Considered in Arriving at the Measure of Damage for Breach of This Contract.

It is basic that in a breach of contract action for damages for failure to deliver any particular commodity which is bought and sold in the market place, the market value of such commodity can be considered as a proper measure of damages.

The case of **Gardner v. The Roycrofters**, 134 App. Div. 45, 118 N. Y. S. 703, aff'd 197 N. Y. 511, 90 N. E. 1158 (1909), is direct authority for the proposition that in a case of this nature the market value of the omitted advertising matter is a proper measure of damages.

In this case plaintiff had purchased from the defendant publishing company all of the advertising space in two periodicals published by the defendant, less certain expressly designated space which the defendant was permitted to use for its own advertising purposes. The de-

fendant breached this agreement by using more than the amount of space which had been allocated to it under the contract, and the plaintiff brought suit. Upon trial, the plaintiff was awarded damages in an amount equal to the market value of the appropriated space at the time of the breach. This was affirmed upon appeal, the Court holding specifically:

> "They (the defendants) knew the only price at which space in the magazine was sold, and the stipulated price for exchange of merchandise advertisements, and, with such knowledge elected to use such space and, when plaintiff asked them to pay for the same, they are not in a position to deny that they occupied this space upon the usual terms. They can not rely upon their own wrong to deprive the plaintiff of the price which similar advertisements paid" (118 N. Y. S. at 705-706).

Another case in point is that of **Tribune Co. v. Bradshaw**, 20 Ill. App. 17 (1886). This likewise was a suit for damages for failure to deliver newspaper advertisements. In discussing the proper measure of damages the Court of Appeals of Illinois at page 23 stated:

> "The applicable rule to the sales of personal property is, that where the article is one that can be bought in the market, the proper measure of damages for the breach of the contract to deliver is the difference between the contract price and the market price at the time of the breach. . . . We think that a rule entirely analogous to the foregoing should apply in determining the measure of damages for the breach of a contract like the one in suit, if it be true that an advertisement of like character was readily obtainable in the market. If no such advertisement could be obtained, so as to invoke the application of a different rule in the admeasurement of damages, it was for the

plaintiff to show that fact. As he has made no such proof, it will be presumed that a similar advertisement could have been readily obtained at the same price, and such price must be held to constitute the measure of damages . . . ." (20 Ill. App. at 23).

The following cases likewise are authority for the proposition that in a suit for breach of an advertising contract, the value of advertising space is a proper measure of damages.

World's Columbian Exposition v. Fasteur-Chamberlain Filter Co., 82 Ill. App. 94 (1898);

Mudge & McLean v. Adams, 37 Tex. Civ. App. 186, 83 S. W. 722, 22 L. R. A. (N. S.) (1904).

Tennessee decisions are not in conflict with, but are in accord with, the foregoing cases. In Tennessee the usual measure of recovery for breach of contract is the value of the promised performance.

In **Allen v. Elliott Reynolds Motor Co.**, 33 Tenn. App. 179, 230 S. W. 2d 418 (Cert. denied), wherein the Court, speaking through Judge Felts, now a Justice of the Supreme Court of Tennessee, said at page 192:

> "The usual measure of recovery for breach of contract is the value of the promised performance.

Likewise, in the case of **Black v. Love & Amos Coal Co.**, 30 Tenn. App. 377, 206 S. W. 2d 432 (Cert. denied), the Court of Appeals again speaking through Judge Felts, said at pages 383-384:

> "Ordinarily, the only loss the buyer sustains from the seller's non-delivery of the goods is the difference between the contract price and the market price of the goods, because he can replace them by buying in the market. "The proper measure of damages in general is the difference between the contract price

and the market price of such goods at the time when, and place where, the contract is broken, because the purchaser having the money in his hands may go into the market and buy." 5 Williston on Contracts, Rev. Ed., sec. 1383; Tennessee Fertilizer Co. v. International Agricultural Corporation, 146 Tenn. 451; 463-464, 243 S. W. 81.

"In cases, however, where there is no available market or where there are other special circumstances enhancing his loss, the buyer may recover such damages as naturally arise, according to the usual course of things, from the seller's breach, or such as may reasonably be supposed to have been contemplated by the parties, at the time of making the contract, as the probable result of its breach. Code Section 7260; Chisholm & Moore Mfg. Co. v. United States Canopy Co., 111 Tenn. 202, 77 S. W. 1062; Hagan v. Nashville Trust Co., 124 Tenn. 93, 136 S. W. 993."

The Court of Appeals has ignored the foregoing authorities and attempts to justify its holding on the basis of the decisions involving suits against Western Union and other common carriers for failure to deliver. The rationale of these cases is that the defendants therein should not be charged with liability for unforeseeable damages arising independent of the contract itself, without some notice to them of special circumstances which, if disclosed, would render them liable for special damages.

This is, of course, an extremely different situation from that involving the failure of a party to deliver a commodity when he well knows its value, deals with it daily in the market place and establishes and publishes its value. There is no hidden or concealed pitfall for him. He well knows his liability if he chooses not to deliver.

In **Provident Life & Accident Insurance Co. v. Globe Indemnity Co.**, 156 Tenn. 571, 576, 3 S. W. 2d 1057, the

Supreme Court of Tennessee said, in a breach of contract suit:

> "... In the consideration of this case, and cases of like character, a condition of proof is met which makes it impossible to arrive at a conclusion which we would say gave to complainant an amount which would exactly, and to the dollar, or the cent, represent the damages the complainant has sustained by reason of the breach of the contract by the contractor, but we cannot be satisfied, for this reason, to repel the complainant and allow no recovery. If this standard were applied to building and construction contracts generally, the courts would be powerless, and the parties helpless, in the matter of relief from the courts. Exact justice is not always attained, and the law does not require exactness of computation in suits that involve questions of damages growing out of contract or tort. These cases most often involve in one way or another the acceptance of evidence which is not proof against possible error or mistake."

In **Buice v. Scruggs Equipment Co.** (1953), 37 Tenn. App. 556, 267 S. W. 2d 119, the Court said:

> "The amount of damages is primarily a jury question and the law does not require exactness of computation in suits involving questions of damages growing out of contracts."

In **Calkins v. F. W. Woolworth Co.**, 27 F. 2d 314 (8th Cir.), cert. denied 278 U. S. 645, the Court of Appeals said, in a breach of contract suit:

> "The general rule is that, where the cause and existence of damages have been established with sufficient certainty, recovery will not be denied because they are difficult of ascertainment. In such cases the amount may be fixed by the jury in the exercise

of a sound discretion under proper instructions from the court. . . . While those rules have been more generally applied to torts, they also apply to actions for breach of contract, and a party who has broken his contract ordinarily will not be permitted to escape liability because of uncertainty as to the amount of damages resulting therefrom. . . .

Under the foregoing authorities the Court of Appeals is clearly in error in holding that the jury in the case at bar cannot consider the value of the advertising time in arriving at the measure of damages.

III.

The Court of Appeals Has Rewritten the Instant Contract So as to Give an Option to the Party in Breach Whereby It May Profit From Its Own Breach.

Petitioner respectfully submits that the effect of the Court of Appeal's opinion is to rewrite the contract between it and respondent at the expense of the innocent party and to the benefit of the wrongdoer, so that now respondent, the party in breach of the contract, has an election to either give petitioner its television time or to pay $9,600.00 per year rent.

If what the parties had in mind was that the respondent would have an option whereby it could elect to deliver the television time, or in lieu thereof, pay $9,600.00 per year rent, it would certainly appear in this contract.

The proof in this record is clear and uncontroverted that television time has been an increasingly valuable and expensive commodity over the past ten years.

Petitioner asks the question: If respondent now chooses not to give petitioner the remainder of the television time

due it under its contract, which respondent could do with impunity pursuant to the Court of Appeal's opinion, and simply tenders petitioner a check based on a rental of $9,600.00 per year, what remedy would petitioner have? The answer is none.

The respondent would then be free to sell this valuable time at the price at which these rate cards show that such time can be sold, and petitioner can sit with a useless piece of paper in its hand and look in vain for any language which says the respondent has the election of either scheduling petitioner's announcements or paying petitioner a cash rent of $9,600.00 per year.

In such circumstances petitioner could well meditate about its sole and only purpose for entering into the contract, to wit, to obtain television advertising time. It could not possibly take its rental check and go out on the open market and buy the equivalent space called for by its contract. The rate cards and the testimony in this case clearly show that petitioner could not even begin to replace this advertising with its rent check.

Petitioner submits that if the Court of Appeals is correct, then paragraph 8 of this contract as written must, of necessity, be absolutely deleted in its entirety, and in lieu thereof there must be substituted a provision that respondent has at all times an option to discontinue scheduling petitioner's called-for television advertising time upon payment to petitioner of the sum of $9,600.00 per year.

The proposition that courts are not empowered to vary or rewrite contracts in this fashion is such a fundamental one that it is not deemed necessary to cite to this Court any legal precedent in support thereof.

CONCLUSION.

Petitioner respectfully submits that this petition should be granted so that the right of trial by jury as guaranteed by the Seventh Amendment and the applicable decisions of this Court with respect thereto may be available to not only this, but all litigants, in the Federal Courts of the United States.

Petitioner further respectfully submits that this petition should be granted for the reason that the Court of Appeals has so far departed from the accepted and normal course of appellate review as to call for an exercise of this Court's power of supervision.

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No. 15,004.

United States Court of Appeals
For the Sixth Circuit

Interstate Life & Accident Insurance Company, Plaintiff-Appellee, v. RKO Teleradio Pictures, Inc., Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

OPINION OF THE COURT OF APPEALS

Decided June 11, 1963

Before: Weick and O'Sullivan, Circuit Judges, and Darr, Senior District Judge.

Weick, Circuit Judge. The pivotal question in this appeal is the amount of damages to be awarded for partial breach of a lease of real property to a television station which lease contained a provision for the payment of rent in station identification announcements.

Interstate entered into a lease agreement with Harding College whereby it agreed to acquire land and construct a new building thereon in Memphis, Tennessee to house Harding's television station. The lease was to commence upon the completion of the building and continue for ten years.

The lessee agreed to pay as rental a minimum of twenty station identification announcements each day with an

advertising display which was to include the call letters "WHBQ-TV." The announcements were thus shared by each of the parties taking a portion thereof. They were known as "shared I. D." The pertinent provisions of the lease are set forth in the footnote.[1]

[1] "7. Yielding and paying as rent therefor the rent and sums and services due as herein stipulated: as rent for the leased premises the Lessee shall grant the Lessor the right to all station identification announcements except as hereinafter provided, but in no event less than a minimum of twenty (20) station identification announcements each day; each station identification announcement to be a minimum of eight (8) seconds in duration. Said station identification announcements shall be divided throughout each day in such a manner that at least five (5) station identification announcements are scheduled between the hours of 9:00 A. M. and 12:00 Noon, at least five (5) between 12:00 Noon and 3:00 P. M., at least five (5) between 3:00 P. M. and 6:00 P. M., and at least five (5) between 6:00 P. M. and 10:00 P. M. Said station identification announcements shall include an advertising display as requested by the Lessor and approved by the Lessee, said display to include the "call letters" WHBQ-TV in a legible manner. Verbal identification of Lessor acceptable to and approved by Lessor shall be included on each said station identification announcement. Only the expense of any slides or other advertising material shall be borne by the Lessor. In addition, the Lessor shall have the right to use one ten (10) minute period each week at times to be agreed upon by the Lessor and the Lessee between the hours of 3:00 P. M. and 10:00 P. M.; said agreed upon times subject to change to a time within the hours stated of equal value within a seven (7) day period without notice. All material, artists and contents of said 10 minute programs shall be subject to the approval of the Lessee, and shall not be used for any commercial purpose other than advertising the Lessor or its products. The Lessee has the right to use for its own purposes, commercial or otherwise, a maximum of twenty (20) station identification announcements per week provided no more than four (4) of these station identification announcements are used in any one given day; and provided further, that no station identification announcement may be used for or sold to any other insurance company whatsoever;

"8. Anything herein to the contrary notwithstanding, the Lessor shall have the right thirty (30) days prior to the beginning of any calendar year to discontinue the method of rent described herein, and to receive as rent in lieu thereof the rent, sums or services derived from whichever of the following two (2) methods is elected by Lessee: (1) The time allotted to the Lessor may be sold by the Lessor to another advertiser or advertisers and the proceeds therefrom be retained by the Lessor, or (2) the said time allotted to

The land was acquired at a cost of $30,000 and the building at $112,000. Interstate incurred additional expenses of $9,000. The total cost was $151,000. Shortly after the building was completed, Harding College sold its television station to appellant RKO Teleradio Pictures, Inc. and assigned the lease to this company which assumed all the obligations of the lessee.

RKO commenced to operate the television station and furnish the I. D. announcements to Interstate. Under date of December 28, 1956 the manager of RKO wrote Interstate advising that the station had missed certain announcements and offering to supply them. Interstate replied that it was considering the matter and would write further, but failed to do so. It made no complaint until May 1959. It

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the Lessor may be relinquished to the Lessee, in which event the Lessee shall pay an amount equal to the total of the following amounts: (a) estimated annual cost of all real estate taxes and assessments, (b) annual cost of fire and extended coverage insurance in an amount equal to the replacement cost of the building, such insurance to be underwritten by companies approved by the Lessor, (c) an amount equal to the annual depreciation on the total cost of the building less the portion of the cost of the building which shall be borne by the Lessee as provided in paragraph No. 4, depreciation to be computed at the rate of two (2%) per cent per annum, (d) an amount equal to three (3%) per cent of the Lessor's net investment which net investment is defined as the total cost of the leased premises including the land, buildings and improvements less that portion of the cost borne by the Lessee (as provided in paragraph No. 4) and less the accumulated annual charges for depreciation.

"9. The Lessee shall have an option for a renewal of this lease for a further term of five (5) years or such other term of years as may then be agreed upon by the parties hereto, such option to be exercised at least three months before the termination of this lease, by mailing postpaid, or delivering to the Lessor, a written notice of the desire of the Lessee to renew said lease. If not so exercised, it shall be forfeited. Said renewal shall be on terms and conditions to be agreed upon at the time the option is exercised, said terms and conditions to be in conformity with the square footage rental charges applicable at that time to buildings of like kind, condition and age in the City of Memphis, Tennessee, similarly located in the Cleveland Street area between Peabody Avenue and North Parkway Boulevard."

filed suit in the District Court to recover damages in the amount of $700,000 of which $400,000 was for the reasonable value of the omitted announcements and $300,000 for loss of profits. Under date of December 4, 1961, with leave of court, it waived and withdrew its claim for loss of profits.

The case was submitted to a jury which returned a verdict in favor of Interstate and assessed its damages for breach of contract in the amount of $150,000 and awarded it $15,900 for attorney's fees and expenses or a total of $165,900.

In this Court, the principal claim of RKO was that the verdict was grossly excessive. In an eighty page brief, RKO raised twenty points which it claimed required reversal of the District Court's judgment.

The period of time involved in the damage claim was about five years or 1,793 days. RKO admitted that it was required to give a minimum of 34,810 announcements during this period; that it actually delivered 27,496 announcements and was short 7,314. It delivered approximately 15 announcements per day.

Interstate claimed that the shortage amounted to 12,208 or approximately one-third of the station identification announcements called for under the lease.

RKO offered proof in the District Court tending to show that the shortage was inadvertent and unintentional; that it did not have an accounting system at the time for the shared station identification announcements like it had for other advertisers and no checkoff system against laxity of the traffic clerk who scheduled the announcements. It further claimed that the lease called for so many daily announcements that a point of saturation had been reached whereby any announcements in addition to those actually

furnished had no value as advertisements, but would serve merely to annoy or irritate listeners.

On some days the station did not broadcast until noon and hence could not schedule any announcements in the morning. Interstate asserts that it makes no claim with respect to announcements not scheduled when the station was not on the air.

There was no evidence that RKO during the time in question sold to others any of the contracted for station identification announcements. During this period Interstate made reports to the Department of Insurance and Banking of the State of Tennessee and filed federal income tax returns which showed rental income received by it from the leased property in the annual amount of $9,600. This identical figure can be obtained by computing the cash rent in accordance with the formula provided in the second alternative in Paragraph 8 of the lease.

It was Interstate's contention that it was entitled to recover as damages the amount charged other advertisers by RKO for spot announcements. Interstate used the highest discount rate shown on RKO's rate cards which ranged from 25% to 60% and arrived at a value of $323,243.07 for the announcements not delivered or an average of $26.48 per announcement.

If the value of $26.48 placed by Interstate on each announcement is correct, then Interstate actually received rent for the five-year period of $598,500.96 ($26.48 × 22,602). To this should be added the amount of the verdict of $150,000 making the total rent for the five-year period of $748,500.96. The rental for the 10-year period would be twice this amount or $1,497,001.92.

This would be a fairly good return on an investment of only $151,000, particularly since Interstate still owns its land and the building which has depreciated at the agreed

rate of 2% annually or $12,000 over the five-year period or $24,000 in 10 years.

To say that this was within the contemplation of Interstate and Harding College at the time they entered into the lease requires a wild stretch of the imagination. The alternative annual cash rent of $9,600, computed under the provisions of Paragraph 8 of the lease, certain does not support this contention. Nor does Paragraph 9 which provided an option for renewal of the lease at a rental to be determined "in conformity with the square footage rental charges applicable at that time to buildings of like kind, condition and age in the City of Memphis. . . ."

Under Tennessee law, the damages recoverable for breach of contract are "such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation." **Western Union Telegraph Co. v. Green**, 153 Tenn. 59, 64; **Illinois Central R. R. Co. v. Johnson & Fleming**, 116 Tenn. 624; **Morristown Lincoln Mercury v. Lotspeich Pub. Co.**, 42 Tenn. App. 92; 15 Am. Jur. Damages, § 52, p. 451.

Morristown Lincoln Mercury, supra, was an action by a dealer against a newspaper for breach of contract to publish an advertisement for the sale of automobiles. The dealer claimed that he had contracted to purchase the automobiles but was unable to sell them at a profit because of the refusal of the newspaper to publish the advertisement. The appellate court held that the claim for loss of profits in the sale of the automobiles was too conjectural to allow recovery therefor and awarded nominal damages only. The court said: "Therefore, no actual damages having been proved, none can be recovered under the authorities cited."

Undoubtedly the reason Interstate accepted the television announcements in lieu of cash rent was to secure new

business through advertising thereby increasing its profits, but we cannot consider loss of profits because Interstate has waived that claim. Its waiver was probably influenced by Tennessee law which required more proof of loss of profits than mere conjecture or guesswork.

To prove its damages, Interstate offered in evidence, over the objection of RKO, rate cards which indicated the prices at which advertising was sold by RKO to others in the quantities stated thereon. None of the cards dealt with shared station identification announcements or quantities as large as involved in the case at bar.

We think this evidence was inadmissible. Interstate's measure of damages was not the price for which RKO could sell advertising to others because, under the terms of the lease, Interstate had no right to sell the announcements to which it was entitled. If RKO were suing an advertiser for damages for failure to take advertising under a contract, it could not have recovered the full contract price when it had not furnished the advertising. This is so because the cost of furnishing the advertisement would have to be taken into account. Not all of the contract price represented profit. On the other hand, an advertiser who had not received all of the agreed announcements for which he had paid in cash could certainly recover back the proportion of his payment applicable to the omitted announcements even though he could prove no other damage.

As we view the provisions of Paragraph 8 of the lease, Interstate could discontinue taking the announcements and accept in lieu thereof either of the following two methods elected by RKO:

1. Sell its allotted time to other advertisers, or

2. receive rent in cash computed as provided for therein

Interstate did not discontinue taking the announcements, but on the contrary continued to receive them. It did not want RKO to supply the omitted announcements. It wanted cash instead.

The trouble here is that Interstate does not want the cash rent to be computed as stipulated in the lease, but insists on obtaining in cash the fair and reasonable value of the announcements. This it cannot have because RKO did not object to permit Interstate to sell the announcements.

The Trial Judge instructed the jury in part as set forth in the footnote.[2] We think it was error for the court to

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[2] "In awarding compensatory damages, the object is to place the plaintiff in the same position, in terms of money, as it would have been in had the contract not been breached. Plaintiff here is not suing for restitution or to have returned what it paid out under the contract, but rather is suing for and is entitled to have the benefit of its bargain—its expectancy, so to speak. Therefore, in arriving at just compensation for the plaintiff for the breach of contract involved here, it is necessary for you to place a reasonable and fair value on the shared station identification announcements which you find were not delivered in breach of the contract. At the same time, members of the jury, since plaintiff is not entitled to be placed in a better position in terms of money than it would have been in had the contract not been breached, plaintiff in no event is entitled to recover a sum greater than the amount that you find it has actually been financially harmed by such breach of contract. In other words, plaintiff should not be allowed to profit from any such breach of contract; the object is, as I say, in awarding any damages, to make the plaintiff as well off but no better off than it would have been had the contract not been breached.

"Now the plaintiff has offered in evidence, in support of its theory of the value of the announcements involved and in support of its theory of the amount of damage incurred, the rate cards issued by the defendant television station as well as expert testimony and other evidence, and the Court charges you that you may consider that evidence in arriving at the reasonable and fair value of the television time involved and in arriving at the financial harm the plaintiff suffered, if any, as a result of the breach of contract involved.

"On the other hand, defendant has offered evidence as to discounts allowable for large amounts of television time, evidence as to another actual sale of television time, evidence of what plaintiff paid for this television time, and other evidence in support of

instruct the jury that the plaintiff was entitled to the benefit of its bargain and could consider the rate cards in arriving at the fair and reasonable value of the television

its theory of the value of the announcements involved, and the Court charges you that you may consider that evidence in arriving at the reasonable and fair value of the announcements involved.

"The Court has heretofore charged you that plaintiff is entitled to be made monetarily as well off but no better off than it would have been had the contract been carried out. This is a general principle of the law of damages which is applicable here. This being the law, and since under the lease contract plaintiff was entitled to receive announcements and since the right to receive announcements could not be sold or otherwise transferred by plaintiff, it follows that, in determining the amount of any damages to which plaintiff is entitled, you must consider the actual damaging effect on the plaintiff resulting from the failure to receive the announcements involved. In support of its theory that plaintiff suffered little or no damaging effect as a result of the failure of defendant to deliver the announcements with which we are dealing defendant has offered evidence of the effect of the use of announcements under the conditions and circumstances involved here, and you may consider this evidence in arriving at the amount of damages plaintiff is entitled to recover for the breaches of contract involved here.

"Now, members of the jury, in arriving at the amount of damages, if any, plaintiff is entitled to recover, there is another principle of law of damages as to which the Court will charge you. This principle is that a party which has suffered a breach of contract may recover, for such breach, damages and only such damages as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. In determining what damages can reasonably be said to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it, you may consider all the facts and circumstances which have been admitted in evidence in this case, including all of the terms of the contract itself.

"Members of the jury, while the amount of damages a plaintiff is entitled to recover may not be based on speculation, guess or conjecture, at the same time in cases of this kind, the amount of damages suffered may be uncertain, but uncertainty as to the exact amount is no reason for denying recovery. The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not prevent recovery. The law does not require exactness of computation in suits involving questions of damages growing out of contracts. Damages are allowable where they are not in fact remote or speculative, and are proved to a reasonable certainty.

time. The fair and reasonable value of the television time was not an issue in this case. The net effect of all this undoubtedly influenced the jury to return a large verdict. RKO objected to this portion of the charge and also tendered a special request to charge which was denied.

In our judgment, the only fair measure of damages to be applied in this case is the formula agreed upon by the parties in the lease for annual cash rental. It represents what the parties thought at the time was the fair and reasonable rental value of the property payable in cash. This view is strengthened by the conduct of Interstate in reporting the rents computed in conformity therewith amounting to $9,600 annually in its federal income tax returns.

Using this formula, the computation of Interstate's damages becomes simple. Interstate received all but one third of the announcements to which it was entitled. Its damage for one year would be one third of $9,600 or $3,200 and for five years it would amount to $16,000. There was no evidence of other damages.

In our opinion, because of the provisions of the lease, Interstate was entitled to collect its reasonable counsel fees and expenses in the amount of $15,900. RKO did not dispute the reasonableness of the attorney's fees or expenses, but questioned its liability for the fees on the ground that there was no evidence of any obligation on the part of Interstate to pay for the same. The District Judge thought there was such evidence and submitted the issue to the jury. We think he was correct in so doing.

It follows that the verdict and judgment were excessive to the extent that they exceeded the amount of $31,900 which was the amount of Interstate's damages, attorney's fees and expenses. We do not find that the verdict was influenced by passion and prejudice.

In view of this disposition, it is unnecessary to pass upon the other errors claimed.

The judgment will, therefore, be reversed and the case remanded to the District Court for a new trial unless Interstate, within twenty days from the date hereof, remits from its judgment the sum of $134,000 and files the remittitur with the Clerk of this Court. If said remittitur is timely filed then the judgment will be affirmed in the amount of $31,900 with interest at 6% per annum from February 1, 1962.

No. 15,004.

United States Court of Appeals for the Sixth Circuit.

Interstate Life & Accident Insurance Company,
Plaintiff-Appellee,
vs.
RKO Teleradio Pictures, Inc.,
Defendant-Appellant.

ORDER ON PETITION FOR REHEARING.

Filed July 16, 1963.

Before: Weick and O'Sullivan, Circuit Judges, and Darr, Senior District Judge:

In our opinion on the merits we pointed out that appellee had waived any claim for loss of profits. It was, therefore, restricted to recovery of actual damages which it sustained by reason of partial breach of the lease. The only damages shown by the record were allowed to appellee by this Court. In so doing we adopted its computation as to the number of omitted announcements rather than the substantially smaller number claimed by appellant, although this issue of fact was in dispute.

The only new matter contained in the petition for rehearing is the claim that appellee is entitled to reimbursement for counsel fees and expenses incurred in the appeal. The trouble with this claim is that appellee lost in the appeal. In the District Court appellee was awarded $15,900 for attorneys' fees and expenses incurred in recovering damages which we have reduced to $16,000. We do not

think that the provision in the lease for payment of attorneys' fees can be construed to embrace legal services and expenses in prosecuting a claim held to be without merit. In any event, in our judgment, the award made in the District Court was ample to reimburse appellee for attorneys' fees and expenses incurred in the appeal.

The petition for rehearing is denied.

Paul C. Weick,
United States Circuit Judge.

In the District Court of the United States for the Western District of Tennessee, Western Division.

Interstate Life & Accident Insurance Company, Plaintiff, v. RKO Teleradio Pictures, Inc., Defendant.	Civil No. 3857

OPINION ON MOTION OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING VERDICT OR FOR ORDER GRANTING NEW TRIAL.

Filed January 30, 1962.

This is a suit filed by the plaintiff, Interstate Life & Accident Insurance Company, against the defendant, RKO Teleradio Pictures, Inc., whose name thus appears in the captions of various pleadings though its correct name has been shown to be "RKO General, Inc.," seeking to recover damages for breach of contract, attorneys' fees and expenses. Under the written lease agreement, upon which suit was brought, plaintiff obligated itself to construct a building in the City of Memphis to be used by the defendant for a television station and, under the terms of the lease, defendant was to pay plaintiff, in lieu of cash rent, rent in kind in the form of spot television announcements which would advertise plaintiff's business.

The jury rendered a verdict in favor of the plaintiff as follows: For damages for breach of contract in failing to deliver the number of spot announcements required by the contract, $150,000; for attorneys' fees and expenses, $15,900.

At the trial the parties stipulated that expenses incurred by the plaintiff, which were reasonable, were $3,900.00, so that it is clear that the jury awarded damages for attorneys' fees of $12,000.00.

Defendant has made a motion for a judgment notwithstanding the verdict or for a new trial, and at the conclusion of oral argument of counsel the Court then overruled the motion with respect to all questions except the question of the propriety of the verdict with respect to attorneys' fees and has taken this aspect of the motion under advisement.

In brief, it is defendant's argument, in connection with the attorneys' fees, that under the lease agreement upon which the claim is based, plaintiff's right to recover attorneys' fees from defendant is only a right to be indemnified, and since plaintiff did not prove that it had actually paid or incurred attorneys' fees in connection with the litigation it should not have been allowed to recover them.

The relevant provision in the lease agreement, having to do with attorneys' fees, provided as follows:

> 21. Lessee further covenants to pay all reasonable attorneys' fees and expenses of the Lessor incurred in enforcing any of the obligations of the Lessee under this lease, or in any litigation or negotiation in which the Lessor shall, without his fault, become involved through or on account of this lease.

In the charge to the jury the Court simply instructed the jury in substantially the same language as that contained in the lease agreement insofar as the right of plaintiff to recover attorneys' fees was concerned.

Defendant has properly preserved its rights in that it generally denied in its answer that plaintiff was entitled to recover attorneys' fees under the circumstances; it

moved the Court at the conclusion of all of the evidence to withdraw the issue of attorneys' fees from the jury and to direct a verdict thereon for the reason that it had not been shown that plaintiff had obligated itself to pay any attorneys' fees to its attorney, and it submitted a special request for instructions to the jury to the effect that plaintiff was not entitled to recover any attorneys' fees because there was no proof of any obligation to pay such fees.

At the trial, plaintiff offered no evidence of an express fee agreement with its attorney, who was representing it at the trial and had represented it in connection with this controversy prior to the trial, and offered no evidence of the non-existence of an express agreement with its attorney with respect to fees. (If there were no express agreement, there would be, of course, an implied contract to pay a reasonable fee. **Newnan v. Washington**, 8 Tenn. 79 (1827)). As stated, it is defendant's insistence that, properly interpreted, the provision for attorneys' fees in the lease agreement is only an indemnity agreement so that plaintiff in no event could recover an amount in excess of that it had paid or incurred an obligation to pay. In the absence of evidence of the existence or the non-existence of an express agreement, the jury could not infer that plaintiff did not have an express agreement to pay a fee of less than $12,000, defendant argues.

In support of its claim for an attorneys' fee, plaintiff did offer as a witness a member of the bar of the City of Memphis who testified that he was generally familiar with the work done by plaintiff's attorney and the members of his firm, including the prior trial which resulted in a mistrial after five days, and that, in his opinion, a fee of $12,000 for the actual time consumed plus an additional 5% of any amount recovered would be a reasonable fee.

It is therefore apparent, from the amount of the verdict as to fees and expenses, that the jury awarded plaintiff, as damages for attorneys' fee, an amount which the proof had shown to be reasonable for the time consumed alone, and awarded no damages for additional fees based on the amount recovered. The Court believes that the amount so awarded, under all the proof, was extremely reasonable and does approve it.

Therefore the only question remaining is whether, as a matter of law, this verdict with respect to attorneys' fees is supportable by the evidence.

It would seem that, and the Court so holds, defendant is correct in its position that the provision with which we are dealing amounts only to an indemnity agreement, because it provides that plaintiff is entitled to recover only "... reasonable attorneys' fees and expenses of the Lessor **incurred** in enforcing any of the obligations of the Lessee' ..." (Emphasis ours). It is interesting to note that the few adjudicated cases which deal with this general problem do not clearly establish whether such an agreement should be treated as only an indemnity agreement and further whether, even assuming an indemnity agreement, it is necessary, to recover, actually to present evidence of the obligation to pay the attorneys' fee. Generally, the cases deal with three types of provisions: (1) an obligation to pay a reasonable attorneys' fee incurred in the enforcing of the obligations contained in the instrument; (2) an obligation to pay a percentage of the amount recovered in the event it is necessary to enforce; and (3) an obligation to pay a reasonable attorneys' fee in the event it is necessary to enforce. The first type of agreement is, analytically, an indemnity agreement, like the agreement in the case at bar, while the latter two types of agreements are not, and are really clauses giving the right to special damages.

Therefore, the real question in this case, since the Court interprets the provision as an indemnity agreement, is whether or not the jury should be allowed to infer from these facts and circumstances not only that plaintiff's attorney had been employed by plaintiff but also that, in the absence of any showing to the contrary, plaintiff was obligated to pay him a reasonable fee for his services.

In the case of **Farmers State Bank v. Haun**, 30 Wyo. 322, 222 Pac. 45, 50-51, **rehearing denied**, 31 Wyo. 201, 224 Pac. 856 (1924), the Court was dealing with a provision for a 25% attorneys' fee in the event the note was placed in the hands of an attorney for collection. This, it would appear, should be construed as a special damage rather than an indemnity provision, but the Court seems to treat it as if it were an indemnity provision. Nevertheless, it held that, where counsel appears and represents the plaintiff, it can be presumed not only that he had authority to so act but also that he had an express or implied agreement to receive reasonable compensation for his services.

In **Rychener v. McGuire**, 66 S. W. 2d 413, 414 (Tex. Civ. App., 1933), the note involved therein provided that if it were placed in the hands of an attorney for collection, the maker must pay 10% attorneys' fee. Again, it will be seen that this provision, properly construed, was a special damage rather than an indemnity provision, but the Court treated it as if it were an indemnity agreement. It held, however, that it would be presumed, in the absence of a showing to the contrary, that the attorney was entitled to receive at least as much compensation as provided for in the note. Compare, **Roberts v. Colt Co.**, 31 S. W. 2d 196, 198 (Tex. Civ. App., 1930).

In the case of **Marsh Wall Products v. Henry Marcus Building Specialties**, 162 Cal. App. 2d 371, 328 P. 2d 259, 264 (1958), it was the contention of the defendant that

the plaintiff should not be allowed to recover attorneys' fees, because the note involved therein provided for attorneys' fees reasonably incurred in enforcing payment of the note and that it had not been shown that plaintiff had obligated itself to pay or had paid its attorney any amount. However, the Court held that was not necessary and that, in effect, the trier of the fact could infer from the representation by the attorney that he had the right to a reasonable fee. Compare, **City Investment Co. v. Pringle**, 49 Cal. App. 353, 193 Pac. 504 (1920).

The rule in Florida seems to be otherwise, for the cases there seem to hold that, even where the agreement is clearly a special damage provision rather than an indemnity provision, it is still necessary, to recover attorneys' fees, to offer evidence of the actual obligation to pay. **North v. Villas**, 111 Fla. 560, 154 So. 245 (1934); **Sarasota Publishing Company v. Palmer & Co.**, 102 Fla. 303, 135 So. 520 (1931); **Realty Bond & Share Co. v. Englor**, 104 Fla. 329, 143 So. 152, 156 (1932); and **Dickerson v. First National Bank**, 101 Fla. 1137, 132 So. 835 (1931). However, in the **North** case, one judge, who concurred specially, felt obligated to do so because of the prior holding of the Florida court in the **Sarasota** case, and stated:

> "Why an attorney whose name is signed to a declaration on a note should have to make oath that he is not rendering his services in the case to the plaintiff gratis in order for plaintiff to recover his attorney's fee indemnity is to my understanding incomprehensible." 154 So. at 246.

See also, **Bish v. First National Bank**, 78 Colo. 326, 241 Pac. 527, 538-9 (1925); **Mulvihill v. First National Bank**, 80 Colo. 72, 249 Pac. 504 (1926); **Interstate Motor Freight v. Gasoline Equipment Co.**, 107 Ind. App. 494, 24 N. E. 2d 418, 420 (1940); **Porter v. Title Guaranty Co.**, 17 Idaho

364, 106 Pac. 299, 304 (1909); **Chapman & Smith Co. v. Crown Novelty Co.**, 175 Ill. App. 397 (1912). See generally: Annot., **Construction and Effect of Lease Provisions Relating to Attorney's Fees**, 77 A. L. R. 2d 735, 745; 12 **Am. Jur., Contracts**, § 185; 11 C. J. S., **Bills and Notes**, §§ 645h and 653.

Since under the general doctrine of the **Erie Railroad** case (304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938)), this Court should apply Tennessee law, including Tennessee conflict of laws, and since Tennessee would undoubtedly, in view of the fact that the lease contract was made and was to be performed in Tennessee, apply its own law, we would be governed by Tennessee authority if there were any in point. Cf. **Carolina Spruce Co. v. Black Mountain R. R.**, 139 Tenn. 248, 201 S. W. 770 (1917); **French Piano Co. v. Hollberg**, 130 Tenn. 650, 172 S. W. 298 (1914). However, the only case which has been cited in this connection by the defendant is **Julian v. American National Bank**, 172 Tenn. 632, 113 S. W. 2d 746 (1938), which is definitely not in point. Moreover, the Tennessee cases cited and relied on by plaintiff are also not in point, and the Tennessee statutory provision creating an attorney's lien (29 T. C. A., § 262), also relied on by plaintiff, obviously presupposes the existence of a contract obligation on the part of the client to pay a fee.

After full consideration of the entire matter the Court has concluded that there are facts and circumstances in the record in this case which should permit a jury to conclude that plaintiff was obligated to pay a reasonable attorneys' fee. Here we have a situation in which plaintiff's attorney appeared and tried this suit which consumed slightly more than two weeks in court; plaintiff offered a member of the bar as a witness who testified as to the amount of work done, including that in con-

nection with the prior trial, and gave an opinion as to the reasonable value of these legal services; and the president of the plaintiff corporation, while testifying at length and who was cross-examined at length, indicated at least inferentially that plaintiff's attorney was representing it under proper authority and testified to nothing which would indicate that he was not entitled to a reasonable fee for his services.

It is therefore the opinion of the Court that the motion of the defendant for a judgment notwithstanding the verdict or for a new trial should, in both respects, be overruled, and counsel will prepare and submit a proper order within five days.

Bailey Brown,
United States District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 516

INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

RKO TELERADIO PICTURES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF RKO TELERADIO PICTURES, INC., RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

RKO TELERADIO PICTURES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF RKO TELERADIO PICTURES, INC., RESPONDENT.

The parties will be referred to according to their status in the District Court, that is, Plaintiff-petitioner as "plaintiff", and Defendant-respondent as "defendant".

Plaintiff's Petition for Writ of Certiorari does not come within the requirements of Rule 19 of this Court, nor does it present any "special or important" reasons for review. The Court of Appeals' decision is not in conflict

with the decision of any other Court of Appeals on the same issues; and it does not decide an important question of Federal law that has not been settled by this Court heretofore, or that conflicts with applicable decisions of this Court.

COUNTER STATEMENT OF THE CASE.

Plaintiff's statement of the case is inadequate, incomplete and inaccurate in a number of respects and contains assumptions and conclusions totally unsupported by the record. For these reasons defendant believes it necessary to set forth a counter statement of the case.

This is a suit brought by the plaintiff as Lessor against the defendant, as Assignee of Lessee, under a written lease, seeking damages for partial breach of such Lease which contains a provision for the payment of rent in station identification announcements over defendant's television station in lieu of cash.

Plaintiff, Interstate Life & Accident Insurance Company, entered into a lease agreement with Harding College whereby plaintiff agreed to acquire land and construct a new building thereon in Memphis, Tennessee; to house Harding College's t.v. station, the lease to begin upon completion of the building and continue thereafter for a term of 10 years (Exh. 1, 429a).*

Harding College agreed to pay as rent to plaintiff a minimum of 20 "*station identification announcements*" each day. These station identification announcements were to contain an advertising display, which would

*This reference and all other references containing "a" are references to pages in defendant's appendix filed in the Court of Appeals.

verbally identify Interstate and also include the call letters of defendant's station, "WHBQ-TV". (Par. 7 of Exh. 1, 430a). Therefore, the station identification announcements called for under the Lease were what are known as a "shared I.D." (154-155a, 156a). During the entire 5-year period, the one and only advertising display consisted of the call letters "WHBQ-TV" accompanied by a verbal statement: "For a secure future, secure with Interstate Life & Accident Insurance Company." (324a).

Under the Lease, these 8-second station identification announcements or "shared I.D.s" were to be given in lieu of cash (44a).

Plaintiff's total investment was $151,000.00, comprised of $30,000.00 real estate cost, $112,000.00 building cost and $9,000.00 incidental expenses (39a). At the expiration of the lease the building and land would still be owned by Interstate, and the building would have depreciated at the agreed rate of 2% annually, or 20% in 10 years (Par. 8 of Lease, Exh. 1, 431a).

On July 9, 1954, shortly after the building was completed Harding College sold its t.v. station to defendant, RKO, and assigned the Lease to RKO, which company assumed all the obligations of the Lessee (38a).

Thereafter, defendant commenced to operate the t.v. station and furnish station identification announcements to plaintiff. On December 28, 1956, the manager of RKO wrote plaintiff advising that the station had missed certain announcements and offering to make them good (309-310a), to which plaintiff replied that it was considering the matter and would write further, but failed to do so. It made no complaint until May, 1959 (316a).

On December 9, 1959, plaintiff filed suit in the U. S. District Court for the Western District of Tennessee to

recover damages in the amount of $700,000.00, of which $400,000.00 was alleged to be for the reasonable value of the omitted announcements and $300,000.00 for loss of profits (6a). On December 4, 1961, with leave of Court, *plaintiff waived* and withdrew its *claim for loss of profits* (15a).

The District Court overruled defendant's motion for directed verdict made at conclusion of plaintiff's proof (138a) and renewed at the conclusion of all the proof (400a). The jury returned a verdict in favor of plaintiff and assessed its damages for breach of contract in the amount of $150,000.00 and awarded it $15,900.00 for attorney's fee and expenses for a total of $165,900.00 (15-16a).

Defendant filed a Motion for Judgment Notwithstanding Verdict or for Order Granting New Trial (17a). The motion was overruled (31-32a), following which defendant appealed the judgment to the Court of Appeals for the Sixth Circuit on the ground that the verdict and judgment were excessive, and on the ground that the Court as a matter of law had committed errors relating to questions of evidence and had erroneously instructed the jury. The Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court for a new trial, but gave plaintiff the option of filing within 20 days from the entry of the judgment a remittitur in the sum of $134,000.00. It is this judgment which plaintiff now asks this Court to review.

The period of time involved in plaintiff's claim is approximately 5 years, or 1,793 days. During this period if WHBQ-TV had been on the air every day for a full operating day it would have been required to furnish a minimum of 35,860 station identification announcements (20 minimum per day X 1,793 days) (171a; Exh. 44, Col.

1, 455a). However plaintiff waived claim for 1050 announcements not given due to "late sign-on"; thus, the net result was 34,810 station identification announcements required under the lease for the 5-year period.

During this same 5-year period defendant actually delivered 27,496 station identification announcements (171a; Exh. 44, Col. 2, 455a), or an average of approximately 15 announcements per day (393a).

According to plaintiff's computation, the net shortage amounted to 12,208 station identification announcements (114a, 380a), or approximately 1/3 of the station identification announcements called for under the Lease (46a, 131a).

The undisputed proof shows that the shortage was inadvertent and unintentional; that defendant did not have an accounting system at the time for shared station identification announcements as it did for other advertisers and no check-off system against laxity of the traffic clerk who scheduled the announcements (169a, 170a, 226a, 294a, 305-306a).

The proof is undisputed that there are various ways in which a television station uses its television announcement time between and within programs. This time can be: (1) sold as a commercial announcement; (2) used in identifying the station, either alone or shared with an advertiser; (3) used to promote programs to be presented over the station at a later time; (4) given to charities (Heart Fund, etc.), which are called public service announcements; or (5) used for news bulletins. The station does not receive money for any of the above uses of time other than commercial announcements or shared station identification announcements (155a).

Even though paragraph 7 of the Lease permits the station to sell 20 "station identification announcements" per week (but not more than 4 per day in any one given day), defendant did not sell any of such station identification announcements (226a), and as a matter of *undisputed* fact, the station never sold any "station identification announcements" of any kind to anyone at any time other than those sold to Interstate under said Lease (224a, 307a).

Paragraph 8 of the Lease provides that Interstate, as Lessor, had the right to discontinue receiving the 8-second station identification announcements; and if it elected to do so, then *Defendant had the option* of (1) permitting Interstate to sell said advertising time to a third party, or (2) paying Interstate cash rent in an amount computed in accordance with a formula set forth in the Lease, based on taxes, insurance, annual depreciation and the Lessor's net investment (Exh. 1, 431-432a), which amounted to $9,600.00 per year (44-45a).

Therefore, there was no possible way under said Lease that Interstate could sell any of the announcements called for under it to anyone without the consent of defendant (45a; 410a, Exh. 1, 431a). *Clavin Johnson, President of Interstate, clearly admitted this fact* (45a).

During the 5-year period in question defendant published rate cards that reflected the current rates charged by WHBQ-TV for various types of advertising time in various quantities (160a, 294a). Volume discounts were allowed on all rate cards (160a, 294a), and the prices varied with the length of time of each announcement and the quantity of announcements purchased (160a). The largest discount on any rate card was for 12 announcements per week; and none of defendant's rate cards dealt with

shared I.D.'s or with quantities as large as 140 announcements per week, which was the minimum number of announcements called for under the Lease (136-137a). These rate cards were offered in evidence by plaintiff and admitted by the Trial Court over defendant's objection. The Court of Appeals held this to be error.

Defendant contended that since paragraph 8 of the Lease provides that if plaintiff elects not to use the announcements to which it is entitled under the Lease the *defendant* has the alternative of paying its rental in cash or permitting plaintiff to sell the announcements, that this provision clearly shows that the parties to the Lease originally *contemplated* that the announcements called for under the Lease were substantially equivalent to the alternative cash rent of $9,600.00, as computed in accordance with the formula in paragraph 8 of the Lease, and that said Lease by its very terms evaluates those announcements by agreement of the parties (9-10a; 45a; Exh. 1, 431a).

It is undisputed that during this 5-year period plaintiff annually filed sworn reports to the Department of Insurance and Banking of the State of Tennessee (51-53a; Exh. 6a; Col. 13, 443a), and Federal income tax returns (54a, Exh. 7a, 445a), each of which reported the receipt by plaintiff of an annual rent in kind on its building of $9,600.00 per year. Defendant accordingly contended at the trial that plaintiff is estopped from asserting that the station identification announcements called for under the Lease have a value greater than $9,600.00 per year (10-11a).

Defendant introduced detailed proof by four expert witnesses in the television industry that the Lease called for so many daily announcements that a point of "saturation" had been reached (142-143a, 295-297a, 329-331a, 353a,

418-419a) whereby any announcements in addition to those actually furnished had no value as advertisements, but would serve merely to annoy or irritate listeners (8-9a; 148-149a, 292a, 329-331a, 354a); and therefore defendant contended that plaintiff had not been damaged at all, or at most was entitled to only nominal damages. This proof was controverted; but it was conceded that once a large number of announcements have been given, any additional announcements which may be given have a substantially reduced value (87a-89a).

Turning now to plaintiff's *Statement of the Case*, it is interesting to note that on pages 6-8 of its petition, plaintiff refers to certain "proof (numbered 1 through 10) on the issue of damages" as being in the *record*.

Plaintiff does not, however, advise this Court anywhere in its entire petition that the Court of Appeals as a matter of *law* held:

(1) That the rate cards introduced in the lower court by plaintiff, over defendant's objection, were inadmissible evidence; (Court of Appeals Opinion, 318 F.2d 73, 77).

(2) That the Trial Judge erred in instructing the jury that it could consider the rate cards in arriving at a fair and reasonable value of the television time. (Court of Appeals' Opinion, supra, 77-78).

In ruling that the rate cards were inadmissible, the Court of Appeals said (page 77):

(1) "None of the rate cards dealt with shared station identification announcements or quantities as large as involved in the case at bar"; and

(2) "Interstate's measure of damages was not the price for which RKO could sell advertising to others, because under the terms of the Lease, Inter-

state had no right to sell the announcements to which it was entitled."

The proof recited in paragraphs 2, 4, 5, 7, 9 and 10 (on pages 6-8 of Plaintiff's Petition) directly relates to the defendant's rate cards, or is proof of facts that are based upon said rate cards, and therefore, under the ruling of the Court of Appeals, is not "in the record."

Plaintiff concludes on page 8 of its Petition that the proof set forth in paragraphs (1) - (10) clearly establishes a "*fact issue* as to what damages may reasonably be said to have been within the contemplation of the parties as a probable result of the breach of contract." In arriving at this conclusion, plaintiff again disregards the fact that the Court of Appeals ruled inadmissible the rate cards and all proof based upon them. Defendant asserts that the only *admissible* proof on the issue of damages cited by plaintiff is set forth in paragraphs 1, 3, 6 and 8 of plaintiff's petition, and defendant respectfully submits that such proof does *not* establish a fact issue as to what damages might have been within the contemplation of the parties as a result of a breach of contract, but on the contrary supports the holding of the Court of Appeals that no such fact issue exists.

Aside from the question of admissibility, it is pertinent to note that the facts set out in paragraph (4) on page 7 of plaintiff's petition are wholly and completely unsupported by the record; and that the statement set out in par. (5) is not correct. To the contrary, the proof was *undisputed* that the station never sold any "station identification announcements" of any kind to anyone at any time, other than those sold to plaintiff under said Lease (226a, 307a). Since station identification announcements were admittedly the *only* type of announcements

to which plaintiff was entitled under the Lease (430a), it follows that if defendant sold no such announcements it could not have sold any television time to which plaintiff was entitled.

It is also pertinent to note that paragraph (9) on page 8 of plaintiff's petition refers to the fact that the defendant's manager wrote a letter in which he "measured the value of plaintiff's television spot announcements in terms of cash. . ." This statement is not correct. The date of this letter is December, 1956 (*not* December, 1959), and the record is clear that it never was the intention of the manager in this letter to attach any monetary value to the announcements, but only to establish a ratio upon the basis of which those announcements missed could be made up (314-315a, 317a, 322a, 327a). However as the Court of Appeals notes plaintiff did not wish these announcements made up in kind, as indicated by its failure to act upon this letter for over two years (316a).

PLAINTIFF'S SUMMARY OF OPINION OF THE COURT OF APPEALS.

On page 9 of its Petition plaintiff sets forth what purports to be a *summary* of the action of the Court of Appeals, which it designates "Opinion of the Court of Appeals". This is in fact plaintiff's own *conclusions* as to what the Court of Appeals held.

For example, plaintiff *concludes* that the Court of Appeals only looked to a *part* of the alternative provisions of paragraph 8 of the Lease contract (erroneously called paragraph 7 in plaintiff's Petition), and that it completely ignored the immediately preceding clause of the contract, which plaintiff states "contemplated that petitioner be entitled to sell its allotted television time for cash or its

own account if it ever elected to discontinue its advertising program". This statement of plaintiff implies that the quoted provision is an accurate and complete summary of the contract provision when in actuality this is a complete misstatement. The contract does *not* provide that petitioner has the unqualified right "to sell its allotted television time". Clavin Johnson, President of Interstate, admitted on the stand that plaintiff was *not* entitled to sell the television time called for under the Lease to anyone, *without the consent of defendant* (45a). Defendant likewise so interpreted the Lease (422a, Special Instruction Requested No. 16), as did the Trial Judge (410a) and the Court of Appeals (plaintiff's Petition page 31).

ARGUMENT.

QUESTION I.

There Is No Competent Evidence in the Record to Support a Verdict in the Amount Returned by the Jury.

The Court of Appeals in this case did not reduce the verdict and judgment *per se* as plaintiff states in its petition. That Court reversed the judgment and remanded the case to the District Court for a new trial, but gave plaintiff the option to remit its judgment, if plaintiff desired to so do. This does *not* violate the 7th Amendment to the United States Constitution. *Ark. Valley Land Co. v. Mann Colo.*, 130 U.S. 69, 32 L. Ed. 854, 9 S. Ct. 450; *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 39 L. Ed. 889, 15 S. Ct. 751; *3 A.J., Appeal and Error*, § 1179, pp. 687-688.

The Court of Appeals *does* have the power to remand the case for a new trial, unless plaintiff files a remittitur to plaintiff's judgment, and the exercise of such power does not involve the substitution of the Court's finding of fact for that of the jury, or amount to a usurpation by the Court of the province of the jury, when the amount of the recovery is excessive, and the excess may be so segregated that the Court can distinguish and separate the erroneous part, or the excess is capable of correction by computation. *Hanson v. Boyd*, 161 U.S. 397, 40 L. Ed. 746, 16 S. Ct.; *Ark. Valley Land Co. v. Mann Colo., supra; Koenigsberger v. Richmond Silver Mining Co., supra; 3 A.J., App. & Error*, §1173, §1174, pp. 682-685. This power is within the discretion of the Court. *Northern Pac. R.R. Co. v. Herbert*, 116 U.S. 642, 29 L. Ed. 755; *Ark. Valley Land Co. v. Mann, supra.*

As stated in *3 A.J., App. & Error*, §1177, p. 687:

"In so affirming a judgment on condition of remittitur, the Court is not substituting its judgment

for that of the jury. By such action the Court does not indicate what amount it would have given, but only such amounts as it would not feel at liberty to pronounce excessive."

Under the generally accepted rule, a Court may permit an amount included by reason of "an *erroneous instruction of the trial* court, or the *erroneous admission of evidence*, to be remitted, and affirm the judgment for the reduced sum provided it can determine the amount of such items or segregate them. . ." (*3 A.J., App. & Error*, §1174, p. 684). *See also*: *4 C.J., Appeal & Error, Sections 3147 (aa), 3148 (bb), 3150 (cc)*.

As stated in *5B C.J.S., §1869, page 312 and pages 313-314*:

> "The *improper admission or rejection of evidence* whereby the jury are caused to return too large a verdict will not necessitate the granting of a new trial if appellee remits a portion of his recovery fully sufficient to cover the amount of excess produced by such error, and, after such remission, the judgment may be affirmed as to the balance."
>
> ". . . the courts have frequently allowed remittiturs in cases where an excessive verdict was caused by an *erroneous instruction as to the measure of damages generally* . . . or where the court erroneously *submitted to the jury an element of damage unsupported by competent evidence*." (Emphasis supplied).

The above principle of law has been applied by practically every court in the country: by this Court in the case of *Hansen v. Boyd*, 161 U.S. 397, *supra* (an erroneous instruction affecting the size of the verdict); by the Supreme Court of Tennessee in the cases of *Sou. Ry. Co. v. Shipley*, 147 Tenn. 40, 245 S.W. 525 (a contract action—erroneous admission of evidence and erroneous charge to jury as to measure of damages) and *National Life & Acc.*

Ins. Co. v. Morrison, 179 Tenn. 29, 162 S.W.2d 501 (personal injury action—Court erroneously submitted element of damages unsupported by competent evidence); and by the 6th Circuit Court of Appeals in the cases of *Mosby* v. *U.S.*, 194 Fed. 346, 350-351 (erroneous instruction to jury on element of damages covering excessive verdict), and *C. J. Huebel Co.* v. *Leaper*, 188 Fed. 769 (erroneous admission of evidence and instruction to jury affecting size of verdict) wherein it cites the case of *American Nat. Bk.* v. *Williams*, 101 Fed. 943 (8th Cir.) (erroneous instruction to jury on element of damages causing excess verdict which amount of excess could be determined by mathematical computation). The 2nd Circuit Court of Appeals applied this principle in an action for deceit in the case of *Loewer* v. *Harris*, 57 Fed. 368 (jury verdict of $8,741.67 was remitted because the erroneous instructions to jury on damages were only injurious to the extent that the jury allowed damages in addition to the $5,000.00 that plaintiff was entitled to).

In the instant case, the Court of Appeals (318 F.2d 173, 77-78) properly found, as a matter of law, both an *erroneous admission of evidence* (the rate cards) and an *erroneous instruction to the jury* by the Trial Judge (charging that the rate cards could be considered in measuring plaintiff's damages), based upon its holding that the amount charged other advertisers in the open market for advertising of different types and in different quantities was inadmissible.

On these points the Court's ruling was a matter of law, *not fact* as contended by plaintiff on page 11 of its Petition, and was based upon its interpretation and construction of paragraph 8 of the Lease, which was plain, clear and unambiguous, and which established as a matter of law that plaintiff could not sell the station identification announcements to which it was entitled under the

lease without defendant's consent, thus depriving them of any market value which they might otherwise have.

There is no question but that interpretation and construction of an unambiguous written contract is for the *Court* as a *matter of law*. *Hamilton* v. *Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, 34 L. Ed. 419, 10 S. Ct. 945; *Godson* v. *MacFadden*, 162 Tenn. 528, 39 S.W.2d 287; *Toomey* v. *Atyoe*, 95 Tenn. 373, 32 S.W. 254; *Barker* v. *Freeland*, 91 Tenn. 112, 18 S.W. 60.

The Supreme Court of Tennessee in the *Toomey* case, *supra*, on page 381 said:

> "What the written agreement of the parties means on its face, what the extent of the obligations assumed and imposed thereby, are questions of *law* to be decided by the *Court* as contra-distinguished from a jury, and for ultimate decisions of this Court." (E.S.).

In interpretating and construing a contract, the law is clear that the Court has the duty to determine the intention of the parties. The Supreme Court of Tennessee in its opinion in the case of *Perkins Oil Co.* v. *Eberhart*, 107 Tenn. 409 (64 S.W. 760), held it was a cardinal rule of construction that all instruments are to have the "effect given them according to the *manifest* intention of the parties, as apparent from the whole *instrument*. . ." (p. 415). In short, the Court must look to the *four corners of the contract*. Its language controls when plain and unambiguous. And as later stated by the Supreme Court of Tennessee, the Court should determine what the intention of the parties was *"as actually embodied and expressed in the instrument as written."* *Petty* v. *Sloan*, 197 Tenn. 630, 642, 277 S.W.2d 355, 360.

In the instant case, paragraph 8 of the Lease clearly provided that Interstate, as lessor, had the right to discontinue receiving the station identification announcements; and if Interstate elected to exercise such right, then *de-*

fendant had the option of (1) permitting plaintiff to sell said advertising time to others, or (2) paying plaintiff cash rent in an amount computed in accordance with a formula set forth in said Lease (Exh. 1, 431-432a).

The Court of Appeals did not favor one of the alternative clauses of paragraph 8 over the other as plaintiff contends on page 11 of its Petition, but the Court looked at the whole Lease, including *both alternatives* set forth in paragraph 8 thereof, and held as a matter of law that plaintiff did not have the unqualified right to sell said announcements called for under the Lease.

In so ruling, the Court of Appeals no doubt recognized the rule of "practical construction". That is, the construction and interpretation given by the parties themselves to a contract is always persuasive to the Court. *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Sherman* v. *Cate*, 159 Tenn. 69, 72, 16 S.W.2d 25; *State* v. *Vanderbilt Univ.*, 129 Tenn. 279, 164 S.W. 1151; 8 Williston, Contracts, § 623. In this regard, the proof showed that the Lease was so clear, plain and unambiguous in its expressed meaning that all three, the plaintiff (45a), the defendant (42a, So. Instr. #16) and the Trial Judge (410a) concurred that under said Lease plaintiff could not sell the announcements.

Therefore, once the Court of Appeals as a matter of *law* so interpreted the Lease, then it logically followed that the rate cards and any proof as to the price at which such advertising could be sold on the open market was *not* material or competent evidence of plaintiff's damages, *nor* was the same within the contemplation of the parties as a probable result of any breach of the Lease.

From this it resulted that plaintiff's sole proof of its alleged damages, the *mathematical computation based upon the rate cards*, which was the only evidence which could conceivably support a verdict in the amount that the

jury found, also became inadmissible as a matter of law, and was thus *expunged* from the record.

Nevertheless plaintiff, on pages 12-13 of its Petition, refers to certain supposed proof in the *record*, just as it did in its "Statement of The Case", and again fails to tell this Court that the facts set forth in paragraphs 3-5 were held by the Court of Appeals to be inadmissible evidence and are therefore not in the *record*.

In paragraph (6) on page 13 of its Petition, plaintiff again states that the Court of Appeals favored one of the alternative provisions in paragraph 8 of the Lease over the other, whereas it is obvious that the Court did not do so, but to the contrary the Court construed the *entire* Lease including all of the provisions of paragraph 8. Plaintiff quotes part of paragraph 8 of the Lease (p. 13 of Petition) out of context and again erroneously implies that plaintiff had the unqualified right to sell said announcements if it desired to do so.

When these paragraphs are deleted from the record, plaintiff is left with only the *admissible facts* set forth in paragraphs (1) and (2) on page 12 of its Petition, and it cannot possibly be contended that these two facts constitute proof as to "measure of damages" which would support a verdict of $150,000.00.

Plaintiff loosely refers to "*value*" of advertising in both paragraphs (2) and (7) on pages 12-13 of its Petition and in the next to last paragraph of Argument I on page 17 of its Petition. The entire issue in this lawsuit on the question of damages involved a determination of "*value*"; but there is *no proof* in the record to support a statement that the "market" value of the advertising was the sole inducement for plaintiff to enter into the Lease! If this is what plaintiff means in said paragraph (2), then plaintiff again quotes an alleged fact that is totally unsup-

ported by the record. (Incidentally, plaintiff fails to cite a reference to the Appendix.) On the contrary, the Lease itself negatives any idea of market value by depriving plaintiff of the right to sell the announcements except with defendant's permission. The Lease clearly shows that the parties not only considered, but *contemplated* and intended that the "*value*" of the advertising announcements was equivalent to the $9,600.00 alternative "cash rent", as computed in the formula set forth in paragraph (8) of the Lease.

ALL OF THE COMPETENT EVIDENCE IN THE RECORD SUPPORTS THE VERDICT AS REMITTED.

Once the evidence based on the rate cards is expunged from the record as a matter of law, then as the Court of Appeals held, the *balance* of the *evidence in the record*, and the only admissible evidence, which includes the *Lease itself*, supports the verdict only in the amount remaining after the remittitur which the Court suggested.

Without the rate cards and the computation based upon them, the excessive portion of the verdict must fall, *it being easily distinguishable and separable from the value of the announcements as clearly spelled out within the Lease itself.* The consideration given for the announcements was the use of plaintiff's building; the fair rental value of the building was $9,600.00; therefore, the value of the announcements was $9,600.00.

Here once again the Court of Appeals, pursuant to sound legal principles of interpreting and construing a contract, looked to the *four corners of the Lease*, including paragraphs 8 and 9 thereof, together with the action of the parties under said Lease. By so doing, the Court of Appeals found that paragraph 8, *agreed upon by both parties*, had a clause therein that protected the defendant *in the event plaintiff decided not to continue* to consume

the station identification announcements, under which defendant could determine whether it would pay Interstate cash rent of $9,600.00 or permit Interstate to sell the advertising. *This clause clearly showed the intention of the parties*, which was that under no circumstances would defendant be liable for more than $9,600.00 annual rent, whether in cash or in kind. The clear and inevitable result of such a clause is this:

> If, at the time plaintiff elected not to continue receiving announcements:
>
> (a) Said announcements were of *more value* on the open market (as plaintiff claimed at the trial based upon its mathematical computation), than the cash rental provided in the Lease, then defendant could have paid the cash rent of $9,600.00 and plaintiff would have been bound to accept the station's election;
>
> (b) Said announcements were of *less* value on the open market than the cash rental provided in the Lease, then defendant could have demanded that plaintiff sell the announcements (refusing to pay $9,600.00), and plaintiff would have been bound to accept the station's election.

At the time the Lease was executed and agreed upon by both parties, neither of them knew whether this clause would come into play or if so under what circumstances; but it represented their agreed evaluation of the consideration for the Lease of the building. The fact this clause never became effective because plaintiff never elected to discontinue receiving said announcements is immaterial.

The important point is that the parties recognized, *when they signed the Lease*, that said clause *might in the future become effective*, and if such did become so, *plaintiff could never over defendant's objection receive rent greater than $9,600.00.*

In short, both parties *agreed* that the rent to be paid in kind (the advertising announcements) had a *maximum value* equivalent to $9,600.00 per year.

That such was the mutual intention and contemplation of the parties as reflected within the four corners of the Lease, is *corroborated* by the action of plaintiff during the 5-year period, when plaintiff reported its income from the building to both the Department of Insurance and Banking of the State of Tennessee and the Internal Revenue Service of the United States at $9,600.00 annually (51-52a, 54-55a, Exh. 6). Therefore, the record clearly reflects that plaintiff itself recognized the *value* of the announcements called for under the Lease were equal to the alternative method of paying cash rent incorporated in Paragraph 8 thereof.

Thus, after expunging the inadmissible evidence based on the rate cards, the Court of Appeals was compelled as a matter of law to hold that, based upon the unambiguous language of the Lease and the conduct of plaintiff in reporting its income under it, a verdict of no more than $9,600.00 could be supported in the record. This required either a new trial or a remittitur, and the Court gave plaintiff the option as to which it should be.

Plaintiff in its petition cites various legal authorities to support its position, none of which are applicable to the instant case, as plaintiff completely ignores the holding of the Court of Appeals that the Trial Court committed prejudicial error, as a matter of law, in admitting the rate cards as evidence and instructing the jury it could consider them in arriving at its verdict.

For instance, plaintiff cites the case of *Parsons* v. *Bedford*, 28 U.S. 433, 7 L. Ed. 732, but fails to tell this Court that it differs from this case in that therein the defendant failed to raise any points of law growing out of the evidence admitted at the trial, or complain of any error in the Court's

instruction to the jury. In this regard the Supreme Court spoke of the Judiciary Act and said on page 448:

> "And the *appellate jurisdiction has also been amply given by the same act (Secs. 22, 24) to this court to redress errors of law: and, for such errors to award a new trial in suits at law which have been tried by a jury.*" (Emphasis supplied).

Plaintiff also cites the case of *Fairmount Glass Works v Cub Fork Coal Co.*, 287 U.S. 474, but again neglects to give this Court the full picture. Unlike the instant case, the Court's "Charge to the Jury" in the Fairmount case was not excepted to as such, and none of plaintiff's special requests for instructions related to the "measure of damages". On page 486 of the opinion the Supreme Court said:

> "The respondents contend that the District Court *erred in charging . . . the measure of damages . . .; and that this error may be relied upon here in support of the judgment of the Court of Appeals.* . . . There was *no request for an instruction* on this subject and *no objection was made to that given* until after the jury had retired . . . We have, therefore, no occasion to consider the meaning of the charge given, *its correctness as a matter of law, or the materiality of the error, if any, in giving it.*". (Emphasis supplied).

This Court has clearly ruled that when a verdict is grossly excessive as a result of erroneous instructions to the jury on the measure of damages, such an error of law may be the ground for reversal of a lower verdict by an appellate court, without such action on the part of the appellate court being in violation of the 7th amendment to the United States Constitution. *Chesapeake and Ohio R. Co. v. Gainey*, 241 U.S. 494, 496, 60 L. Ed. 1124, 1125, 36 S. Ct. 633.

Plaintiff also cites the case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, but that case is clearly not authority to support plaintiff's position, as it does not

enunciate any principles of law which would preclude a Court of Appeals from reversing a verdict and judgment in the lower court on the ground of prejudicial error through erroneous admission of evidence by the Trial Judge and erroneous instruction on the measure of damages to the jury.

Plaintiff cites the case of *United States* v. *Johnson*, 327 U.S. 106, which involved the sole question as to whether or not the Court of Appeals had the right to review a Trial Court's finding of fact; which was that a government witness had not committed perjury, based upon affidavits filed by defendant in support of his motion for new trial. Again, that case does *not* involve prejudicial *errors of law* made by the Trial Court as a result of erroneously admitting evidence and instructing the jury.

Plaintiff cites the case of *Still* v. *Townsend*, 311 F.2d 23 (6th Cir.). *Unlike the instant case*, the *Still* case, *supra*, did not involve any erroneous admission of evidence, or erroneous instruction to the jury, on the question of measure of damages, which errors on the part of the Trial Court in the instant case were prejudicial errors affecting the size of the verdict. The *Still* case thus fails to support plaintiff's position.

In the instant case, the Court of Appeals did nothing more than follow the overwhelmingly accepted general rule, which was clearly enunciated by the Court of Appeals in the case of *Virginian Ry. Co.* v. *Amentrount*, 166 F.2d 400 (4th Cir.), where the Court said on page 407 that a Court has the duty to set aside a verdict that is "so *excessive* that it *cannot be justified by anything in the record* . . ." and the discretion of the Trial Judge in this regard is "to be exercised in the *light of the record*." (E.S.).

If the Court of Appeals was correct in expunging all evidence based on the rate cards from the record, then

the verdict is clearly excessive when considering the *balance of the record.*

What is the *balance* of the record as it relates to plaintiff's measure of damages:

> The alternative method of paying $9,600.00 cash rent pursuant to the formula *agreed upon* by the parties in the Lease (Exh. 1, Paragraph 8; 431a), corroborated by the action of plaintiff in reporting the rent in kind as gross income in the sum of $9,600.00 (45a; 51-53a; Exh. 6a, col. 13, 443a; 54a; Exh. 7a, 445a).

The balance of the record supports the action of the Court of Appeals in separating the excessive portion of the verdict and *computing the maximum award* to which plaintiff is entitled as equal to one-third of the $9,600.00 annual rent for 5 years, a total of $16,000.00. As the Court of Appeals said in its opinion on p. 78: "There was no evidence of *other* damages." (Emphasis supplied)

As stated in *5B, C.J.S. §1869, page 311,* where the damage "resulting from the error can be segregated from the verdict which is *otherwise supported by the evidence* . . ." (E.S.) the remitted judgment can be affirmed.

This Court, in the case of *Hanson* v. *Boyd*, 161 U.S. 397, *supra*, applied the rule of remittitur when size of the verdict was affected by an erroneous instruction of the lower court to the jury, and said on page 411:

> "The rule has been adopted by this court *that it is proper*, either for the trial court upon an application for a new trial, *or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same.*" (Emphasis supplied).

The ruling in the *Hanson* case was in line with previous decisions of this Court including that of *Northern Pacific R. R. Co.* v. *Herbert*, 116 U.S. 642, *supra*, wherein this Court said on page 647:

> "In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."

In the instant case the Court of Appeals, in computing *$16,000.00* as the *maximum* amount of damages supported by the *remaining evidence* in the record, reduced the verdict to the highest amount the jury could have awarded under the remaining evidence, and thereby conformed to the general rule set forth in *5B C.J.S.*, *§1870, pp. 315-316*, which says:

> "On the other hand, it has been held that the reviewing court is not justified in reducing the verdict below the *highest amount the jury could award under the evidence.*" (Emphasis supplied).

QUESTION II.

Based upon the Only Competent Evidence in the Record the Value of the Announcements to Plaintiff Was Equal to the Value of What Plaintiff Gave in Exchange for It, Which Was the Rental Value of Its Building.

Throughout these entire proceedings, whether inadvertently or by design, plaintiff has confused "value" with "price." (111a-112a, 115a-116a). In an effort to establish the "price" at which advertising similar to that which plaintiff was to receive under the lease was offered to the public by defendant, plaintiff offered in evidence defendants' published rate cards, which the Trial Court admitted

for that purpose (113a). But in doing so the Court limited the purpose for which these "Rate Cards" were admitted, saying to plaintiff's counsel of the witness who introduced them:

> "Of course, this witness is not an expert on advertising as such, and, of course, he can't testify as to values of advertising and I don't think you intend for him to.
>
> "Mr. Price: No, sir. He just made these calculations.
>
> "The Court: What you are doing is as an accountant, you are letting him testify as to how he computed the damage, *assuming that his method is proper*, and no more." (112a) (Emphasis supplied).

Accordingly, in overruling defendant's motion for a directed verdict, the Trial Court said to defendant's counsel:

> "On the question of the amount of damages, the Court has, of course, admitted in evidence the official rate card introduced* by the defendant television station and, of course, I understand your objection to that, that that is not of any probative value on the issue of damage in this case, and the Court has overruled you on that, so *if the Court is right in overruling you on that*, then certainly it is some evidence of damage." (401a. Emphasis supplied.)

It is, therefore, apparent that the whole theory upon which plaintiff's case was tried was that the rate cards, which showed the price at which defendant offered various types of advertising in various quantities to the public, were evidence of the value to plaintiff of the advertising which it was entitled to receive under the lease. But, as the Trial Court clearly indicated in the two quotations above, if this is not the case, then the Court is necessarily relegated to some other basis for determining the extent of that

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*This is clearly a typographical error and should be "published".

damage. And the only other basis in the record is the lease itself, together with the amount of income which plaintiff reported to the Government authorities that it was receiving under it.

On appeal, the Court of Appeals held the rate cards inadmissible. This is apparent from the opinion of that Court (318 F.2d 73, 77), although it would be difficult to ascertain from plaintiff's Petition, where it is repeatedly stated that these rate cards constitute "proof on the issue of damages (which) is in this record" (Plaintiff's Petition, p. 6). Clearly it is one of the functions of a Court of Appeals to review the Trial Court's rulings upon the admissibility of evidence, and other than under exceptional circumstances this Court will not re-examine its action in doing so. That no such circumstances exist is apparent from the Court of Appeals' own statement of its reasons for ruling that this evidence should be excluded:

> "There was no evidence that R.K.O. during the time in question sold to others any of the contracted for station identification announcements." (381 F.2d 73, 76).
>
> "None of the cards dealt with shared identification announcements or quantities as large as involved in the case at bar." (381 F.2d 73, 77).

In other words, the rate cards dealt with the *price* at which defendant offered to sell different types of advertising in different quantities to the general public, not the *value* of the advertising which it was entitled to receive under the lease to plaintiff. So defendant had insisted at the trial, and so the Court of Appeals held.

What is value? A glass of water, which has little intrinsic worth, may be extremely valuable to a man lost in the desert. On the other hand a T-Bone steak, which bears a high price tag on the menu, is of little worth to a man who has just completed a hearty meal. The value

of anything, it would appear, consists of one or more of three elements: (a) the benefit which it will confer by its use, or (b) the amount for which it can be sold to others, or (c) the value of that which was given in return for it.

But in the instant case plaintiff is foreclosed from relying upon either of the first two elements, the first both by operation of law and by specific waiver and the second by the provisions of the lease itself. The benefit, and the only benefit, which the use of advertising can confer upon the user is obviously an increase in business and a consequent increase in profits. But under the Tennessee case of *Morristown Lincoln Mercury* v. *Lotspeich Pub. Co.*, 42 Tenn. App. 92, and similar decisions, loss of profits under these circumstances is too speculative and remote to justify a recovery, and in any event plaintiff has specifically waived any such claim (15a). Accordingly, the Court of Appeals held:

> "Undoubtedly the reason Interstate accepted the television announcements in lieu of cash rent was to secure new business through advertising thereby increasing its profits, but we cannot consider loss of profits because Interstate has waived that claim. Its waiver was probably influenced by Tennessee law which required more proof of loss of profits than mere conjecture or guesswork." (318 F.2d 73, 76-77).

As to the second element, the amount for which plaintiff could have sold the advertising to which it was entitled under the lease, this has no bearing upon the instant case because under the terms of the lease itself none of this advertising could be sold by plaintiff except with defendant's permission (431a), which was never sought nor given (45a). This was expressly recognized by plaintiff's president, who testified:

> "Q: But there was no way under this lease as you understood it, was there, Mr. Johnson, that Inter-

state could sell any of these spots to anybody else without the consent of the lessee? A. That's correct, sir." (45a).

This testimony is not really necessary to elucidate this provision of the lease, for it is perfectly clear and unambiguous upon this point. Under these circumstances, it is for the Court to construe it as a matter of law. *Barker* v. *Freeland*, 91 Tenn. 112, 18 S.W. 60; *Toomey* v. *Atjoe*, 95 Tenn. 373, 32 S.W.2d 254; *Petty* v. *Sloan*, 197 Tenn. 630, 277 S.W.2d 355. As stated by the Tennessee Supreme Court in the latter case, "A Court is not at liberty to make a new contract for parties who have spoken for themselves." (pp. 639-640). Accordingly the Court of Appeals held:

> "Interstate's measure of damages was not the price for which RKO could sell advertising to others because, under the terms of the lease, Interstate had no right to sell the announcements to which it was entitled." (318 F.2d 73, 77).

With these two elements out of the picture, plaintiff was relegated to whatever other evidence remained in the record to support its claim for damages. Obviously the advertising had no market value, for it could not be sold; and where "there is no demand for a thing and *no ability to sell the same*, then it cannot be said to have a market value." 15 *Am. Jur.* 531 (Damages, §122) (Emphasis supplied). And the same treatise says elsewhere:

> "Where personal property is without market value, then the law allows the next best evidence to be given to ascertain its value. In such cases, evidence as to cost and other considerations which may effect value; or which tend to show its worth, actual, real, or intrinsic, is admissible." (20 *Am. Jur.* 339 (Evidence, §372)).

In the absence of the rate cards, what evidence of value remains in the record? The only such evidence is

the lease itself (428a-441a) and the returns and reports which plaintiff filed with the Internal Revenue Service and the Tennessee Department of Insurance and Banking (Exhibits 6-16). Both this lease (45a) and these returns and reports (51a, 52a, 54a, 55a, 57a) place a valuation upon the total amount of advertising due under the lease of $9,600.00 annually.

Thereafter, it becomes merely a matter of mathematics to determine the maximum recovery to which plaintiff would be entitled. Plaintiff claims a shortage of approximately one-third (1/3) of the advertising due it under the lease for a five (5) year period (46a), therefore: 1/3 x $9,600 x.5 = $16,000. This was the amount beyond which the Court of Appeals held the verdict excessive, saying:

> "Using this formula, the computation of Interstate's damages becomes simple. Interstate received all but one third of the announcements to which it was entitled. Its damage for one year would be one-third of $9,600 or $3,200 and for five years it would amount to $16,000. *There was no evidence of other damages.*" (318 F.2d 73, 78. Emphasis supplied).

This is entirely consistent with the cases cited by plaintiff. Both *Gardner* v. *The Roycrofters*, 134 App. Div. 45, 118 N.Y.S. 703 and *Tribune Co.* v. *Bradshaw*, 20 Ill. App. 17, hold that in the absence of other evidence the contract price is the proper measure of damages. Other cases cited by plaintiff are to the same effect. The case of *Morristown Lin.-Mer., Inc.*, v. *Lotspeich Pub. Co.*, 42 Tenn. App. 92, 298 S.W.2d 788, appears to dispose of plaintiff's contention that the Court of Appeals has improperly applied the "Western Union" cases, for that decision applied those same cases to an advertising contract, and the Court of Appeals merely follows the holding of the state court in doing likewise, and reaching the conclusion that only damages "such as may fairly be supposed to have en-

tered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation" are recoverable for breach of such a contract (318 F.2d 73, 76).

Under plaintiff's theory of the case, the rental to be paid on its building over the ten year period of the lease would have a value of over a million dollars (46a), or, as the Court of Appeals computes it: $1,497,001.92 (318 F.2d 73, 76). Not only, as that Court notes, would this be "a fairly good return on an investment of only $150,000" (318 F.2d 78, 76), but "to say that this was within the contemplation of Interstate and Harding College at the time they entered into the lease requires a wild stretch of the imagination" (318 F.2d 73, 76). And jury verdicts cannot be affirmed upon wild stretches of the imagination, but must be supported by substantial evidence. Without the rate cards, which the Court of Appeals has excluded, there is no such evidence in the record, and the largest amount of damages which can be supported in the record is $16,000. Defendant therefore submits that the Court of Appeals was correct in suggesting a remittitur in excess of that amount.

QUESTION III.

The Court of Appeals Has Not Re-written the Contract.

Plaintiff contends that under the opinion of the Court of Appeals it will have no remedy if defendant now or in the future elects not to give plaintiff the remainder of the television time due it under the Lease (which expires in 7 months on June, 1964) and simply tenders plaintiff a check for cash. This statement is absurd because under paragraphs 7 and 8 of the Lease defendant is clearly required to deliver 20 announcements per day *until "plaintiff" elects not to receive them.*

If defendant voluntarily quit giving plaintiff said announcements without plaintiff electing to discontinue receiving them, plaintiff's remedy would be a suit for (1) specific performance, or (2) a mandatory injunction, requiring defendant to deliver any omitted announcements *just as plaintiff could have done in the instant case*, if plaintiff had so desired. Instead, plaintiff voluntarily elected to sue for damages. As the Court of Appeals said (318 F.2d 73, 77): "Interstate did not discontinue taking the announcements, but on the contrary continued to receive them. *It did not want RKO to supply the omitted announcements.* It wanted cash instead." (Emphasis supplied).

Plaintiff's election is binding upon it in the present case, but not in the future. Therefore, there is no way that defendant could ever benefit from a future breach of contract because plaintiff would then have the same number of remedies to select from as it had when it brought suit in the instant case.

Defendant has never omitted any announcements intentionally (169-170a), but in the event defendant were to inadvertently omit any announcements between now and June, 1964, and plaintiff did not elect to sue for specific performance or mandatory injunction, then plaintiff could sue for damages as was done in the instant case. What those damages would be has no bearing upon plaintiff's right to an election of remedies.

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